

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

March 5, 2004

IN RE: APPLICATION OF JACKSON ENERGY)	
AUTHORITY FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND NECESSITY)	DOCKET NO.
TO PROVIDE TELECOMMUNICATIONS)	03-00438
SERVICES AS A CARRIER'S CARRIER)	

**ORDER APPROVING APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

On January 5, 2004, this matter came before the Tennessee Regulatory Authority ("Authority"), for consideration of the *Application of Jackson Energy Authority for a Certificate of Public Convenience and Necessity to Provide Telecommunications Services as a Carrier's Carrier* (the "*Application*").¹

LEGAL STANDARD FOR GRANTING CCN

The *Application* of Jackson Energy Authority ("JEA") was made pursuant to and considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in Tenn. Code Ann. § 65-4-201 *et seq.*, Tenn. Code Ann. § 65-5-212, and applicable sections of Tenn. Code Ann. § 7-52-401 *et seq.*

Tenn. Code Ann. § 65-4-201 provides, in pertinent part:

¹ Chapter 55 of the Private Acts of 2001, § 4(7) provides that Jackson Energy Authority is "subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certified providers of such [telecommunications] services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in Section 65-4-101, but only to the extent necessary to effect such regulation and only with respect to the authority's provision of telephone and telegraph services."

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate. . .

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

In addition, pursuant to Tenn. Code Ann. § 65-5-212, competing telecommunications providers are required to file with the Authority: 1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and 2) information on programs that might provide technical assistance to such businesses.

Pursuant to Chapter 55 of the Private Acts of 2001, § 4(7), JEA's Application is also subject to the requirements of Tenn. Code Ann. §§ 7-52-401, 7-52-403 and 7-52-405. Tenn. Code Ann. § 7-52-401 provides, in pertinent part:

Every municipality operating an electric plant, whether pursuant to this chapter or any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within and/or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations. A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant. . . . Notwithstanding § 65-4-101(a)(2) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

With respect to the applicability of other regulatory laws and rules to municipalities, Tenn. Code Ann. § 7-52-403 provides:

(a) To the extent that it provides any of the services authorized by § 7-52-401, a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee. To the extent that such authority and powers do not conflict with the provisions of title 65, chapter 4 or 5, and any rules, regulations, or orders issued thereunder, a municipality providing any of the services authorized by § 7-52-401 has all the authority and powers with respect to such services as are enumerated in this chapter.

Additionally, Tenn. Code Ann. § 7-52-405 establishes the criteria for a municipality's allocation of the costs of providing its telecommunications services.

To prevent cross-subsidization among the divisions of JEA, Chapter 55 of the Private Acts of 2001, § 4(7) provides that the telecommunications services system "shall be operated as a separate system independent of, and separate from, the other utility systems of the authority."

PROCEDURAL HISTORY

On July 15, 2003, JEA filed its application for a Certificate of Public Convenience and Necessity to provide facilities-based telecommunications services as a carrier's carrier within Madison County, Tennessee. Aeneas Communications, LLC filed a petition to intervene on July 18, 2003, stating it had a cognizable interest in the outcome of the proceedings.

At the regularly scheduled Authority Conference held on August 4, 2003, Director Pat Miller, Director Sara Kyle and Director Ron Jones, the voting panel assigned to this docket, appointed General Counsel or his designee as Hearing Officer to hear preliminary matters, to rule on any petitions for intervention, and to set a procedural schedule to completion. The Panel also voted to hear the Application on the merits. On September 25, 2003, the Hearing Officer filed a Notice of Hearing, scheduling a hearing for October 21, 2003.

On October 10, 2003, Charter Communications, Inc. ("Charter") filed the *Petition of Charter Communications, Inc. for Leave to Intervene and Request for Procedural Schedule ("Petition to Intervene")*, stating it needed to ensure that its interests would be represented, insofar as they related to exemption of certain services from regulatory requirements pursuant to Tenn. Code Ann. § 65-5-208(b). In its *Petition*, Charter also requested a procedural schedule to permit it sufficient opportunity to conduct discovery prior to the hearing of the case. JEA filed

an objection to Charter's *Petition* on October 15, 2003, arguing that the issues regarding Tenn. Code Ann. § 65-5-208(b) Charter raised in its *Petition* were beyond the scope of the certification proceeding and could not be addressed without impairing the prompt and orderly conduct of the proceeding and requesting that the *Petition* be denied. Aeneas did not assert a position regarding the *Petition* filed by Charter. The Hearing Officer heard arguments from the parties on October 16, 2003. The Hearing Officer found that Charter did not sufficiently demonstrate that issues arising under Tenn. Code Ann. § 65-5-208(b) should be considered in this proceeding and struck that portion of Charter's *Petition*. After granting Charter's request for intervention, the Hearing Officer determined that, because JEA had filed with the Authority testimony in support of its application, discovery of JEA's position would not be necessary and a revised procedural schedule was ordered.

JEA'S HEARING

A hearing was held before the Authority on November 10, 2003 and November 24, 2003. John W. Williams, President and Chief Executive Officer of JEA presented pre-filed direct and rebuttal testimony and was subject to cross-examination; Kim Kersey, Senior Vice President of Telecommunications Division of JEA presented pre-filed rebuttal testimony and was subject to cross-examination; Dana R. Wheeler, Senior Vice President and Chief Financial Officer of JEA presented pre-filed rebuttal testimony and was subject to cross examination; Dwight Work, of Work and Greer, presented pre-filed direct and rebuttal testimony and was subject to cross-examination.

Charter called Thomas E. Nanney, Senior Vice President of the Electric System for JEA and Darrell Pope, Telecommunications Project Manager for JEA, both of whom presented direct

testimony and were subject to cross-examination. William J. Barta, founder of Henderson Ridge Consulting, presented pre-filed direct testimony and was subject to cross-examination. JEA and Charter filed post-hearing briefs on December 8, 2003.

At the hearing and in its post-hearing brief, Charter raised issues concerning JEA's statutory authority to finance the construction of the network through municipal bonds; the managerial, financial and technical qualifications of JEA's proposed telephone business unit; the limited oversight of JEA by the TRA because of the structure of JEA's Telecommunications Division; and the issue of subsidization.

JEA countered that it satisfied all requirements for a CCN, including the necessary managerial, financial and technical qualifications. JEA stated further that the cost allocation manual, submitted as part of their Application ("Exhibit C"), provides for the proper allocation of costs among JEA's divisions. JEA also stated that it is authorized by the Private Act to issue bonds to finance its network.

FINDINGS AND CONCLUSIONS

This matter was brought before the voting panel for consideration on the merits at a regularly scheduled Authority Conference held on January 5, 2004. At that Conference the Authority granted JEA's Application, with conditions, based upon the following findings of fact and conclusions of law:

I. APPLICANT'S QUALIFICATIONS

1. Jackson Energy Authority is a utility authority that provides electric, gas, water and wastewater services to approximately 38,000 homes, businesses and industries in Jackson and the adjacent areas of Madison County, Tennessee. JEA was created on July 1, 2001 by

Chapter 55 of the Private Acts of 2001 as a public corporation and political subdivision of the State of Tennessee and is the successor to the Jackson Utility Division of the City of Jackson, Tennessee created in 1959.

2. JEA's principal place of business is located at 119 East College Street, Jackson, Tennessee, 38301. The telephone number is (731) 422-7500.

3. To demonstrate its financial capability to provide the proposed services, JEA has provided financial statements for fiscal years ending June 30, 2001 and 2002 for each of its divisions. In addition, JEA has provided *Pro Forma* financial statements for the Telephone Business Unit of the JEA Telecommunications Division for three (3) years. Chapter 55 of the Private Acts of 2001 authorizes JEA to issue bonds to finance its cable network. JEA's Board of Directors have adopted bond resolutions authorizing issuance of up to sixty million dollars (\$60,000,000) of bonds to provide for the construction of the network and operating expenses during the start-up of JEA's cable and internet operations. JEA has stated that most of the capital requirements will fall under the Cable Business Unit of its Telecommunications Division and that the Telephone Business Unit will have minimal capital requirements. JEA has obtained a line of credit in the amount of one million dollars (\$1,000,000.00) from Union Planters Bank. Therefore, based upon the financial data presented herein, the Authority concludes that JEA possesses the financial ability to provide the services it proposes to offer.

4. With respect to JEA's managerial and technical ability, compelling evidence has been presented to demonstrate that JEA possesses a sufficiently experienced management staff. The record demonstrates that President and Chief Executive Officer John W. Williams, Senior Vice President and Chief Financial Officer Dana R. Wheeler and Senior Vice President Thomas

E. Nanney have substantial managerial and technical experience in the provision of facilities-based utility services. Senior Vice President Kim Kersey has over twenty years of experience in cable television operations, including expansion into broadband services. Telecommunications Project Manager Darrell Pope has significant experience in fiber-based broadband operations. JEA has stated that it will also rely on the expertise of its fiber to the home vendors and will secure independent third party consultants as needed to supplement the expertise of its managers. The Authority concludes that JEA possesses the requisite expertise to provide the applied for services based upon the foregoing demonstration of managerial fitness and technical ability.

5. JEA has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. PROPOSED SERVICES

1. JEA, through the Telephone Business Unit of its Telecommunications Division, intends to provide facilities-based telecommunication services as a carriers' carrier to competitive local exchange carriers ("CLECs") within Madison County, Tennessee. JEA will build a network with a fiber to the home architecture throughout its service area in Jackson, Tennessee and surrounding areas of Madison County. Upon completion, the network will consist of a 658 mile, all-fiber-optic network that relies fundamentally on an internet protocol over gigabit ethernet architecture. This architecture will provide JEA the capability to deliver, cost effectively, 500 Mbps of symmetrical bandwidth to individual subscribers using a single fiber. This will allow the delivery of cable television and internet access to the end user. JEA will enter into wholesale contractual relationships with the CLECs to provide services over the fiber optic network, including the installation and maintenance of subscriber specific infrastructure such as customer gateways to the network.

2. Although CLEC customers will not be required to purchase such services, JEA intends to offer the following services for purchase to the CLECs: 1) billing and customer records management for telephony and data services; 2) payment collection at various payment locations of JEA; 3) customer sales services and/or locations at various locations of JEA; 4) inclusion of the services offered by its CLEC customers under the JEA brand umbrella, including inclusion in JEA's general marketing and advertising; and 5) customer service and help desk support for end users of the CLEC services.

JEA anticipates that the CLEC customers will be responsible for providing or arranging for: 1) all end use services required by law or regulation; 2) a soft-switch that is compatible with the network; 3) connections with long distance carriers; 4) interconnections with BellSouth and other CLECs; 5) technicians to operate and maintain the CLEC customers' equipment; 6) sales personnel and related agent compensation; 7) labor and materials for commercial installations as well as PBX systems and other equipment beyond JEA's gateway to the network; 8) customer support and service; and 9) engineering and technical service.

III. PUBLIC CONVENIENCE AND NECESSITY

Upon a review of the Application and the record in this matter, the Authority finds that approval of JEA's application would benefit the present and future public convenience by permitting competition in the telecommunications services market in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN AND BUSINESS ASSISTANCE PROGRAM

1. JEA has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's rules.

2. JEA has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

V. COMPLIANCE WITH ADDITIONAL CONDITIONS

To prevent cross-subsidization among the divisions of JEA, Chapter 55 of the Private Acts of 2001, § 4(7) provides that the telecommunications services system “shall be operated as a separate system independent of, and separate from, the other utility systems of the authority.” To ensure compliance with this provision and as a condition to the granting of a CCN, JEA must agree to comply with the following:

1. An audit shall be conducted to include an examination of JEA for compliance with Chapter 55 of the Private Acts of 2001, § 4(7), prohibiting cross-subsidization among JEA’s Divisions. The audit shall be conducted by an independent auditor chosen by JEA but under the direction and supervision of Authority staff. This audit shall include an examination to determine the reasonableness of JEA’s cost allocations to the Telecommunications Division as well as any other direct or indirect transactions between the Telecommunications Division, its business units and other divisions and business units of JEA. The audit shall begin upon the closing of JEA’s books for the first fiscal year following the approval of JEA’s CCN and will be completed within six (6) months. Audits shall continue on an annual basis unless otherwise ordered by the Authority.

2. JEA shall provide access to the books, accounts, memoranda, contracts and records of the electric system and the telecommunications division and any other affiliated business unit or company upon request of the Authority.

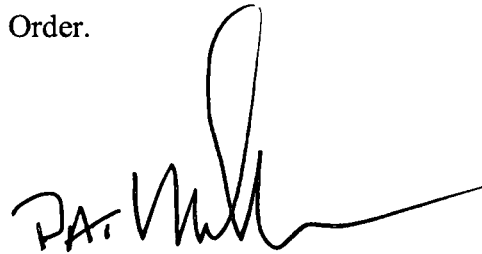
3. JEA shall file a fiscal year-end annual report inclusive of financial statements to the Authority within ninety (90) days after the end of the fiscal year. The results of the financial audit performed by the chosen independent auditor shall be provided to the Authority within one hundred twenty (120) days after the fiscal year-end annual report is issued.

IT IS THEREFORE ORDERED THAT:

1. The Application of Jackson Energy Authority is approved, subject to the conditions listed above;

2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and

3. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a petition for review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.



Pat Miller, Director



Sara Kyle, Director



Ron Jones, Director